



Home Office

Protection of Freedoms Act 2012

Draft statutory guidance on the making or renewing of national security determinations allowing the retention of biometric data

March 2013

Contents

Chapter 1 - Introduction.....	3
Definitions.....	3
Chapter 2 - The making of National Security Determinations.....	7
Powers to make National Security Determinations (NSDS).....	7
Chapter 3 - Requirements.....	10
National security - approach.....	10
Chapter 4 - Keeping of records	15
Recording requirements.....	15
Chapter 5 - Glossary.....	17
Annex A - Section 20(2)(a) to the Protection of Freedoms Act 2012	19
Annex B - Section 63M of the Police and Criminal Evidence Act 1984.....	20
Annex C - Schedule 1 to the Protection of Freedoms Act 2012: Paragraph 20e of Schedule 8 to the Terrorism Act 2000	21
Annex C (a) - Schedule 1 to the Protection of Freedoms Act 2012: Section 18B of the Counter-Terrorism Act 2008.....	22
Annex C (b) - Schedule 1 to the Protection of Freedoms Act 2012: Paragraph 11 of Schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011.....	23
Annex C (c) - Schedule 1 to the Protection of Freedoms Act 2012: Section 18G of the Criminal Procedure (Scotland) Act 1995.....	24
Annex C (d) - Schedule 1 to the Protection of Freedoms Act 2012: Police and Criminal Evidence order (Northern Ireland) 1989	26
Annex D - DNA and Fingerprint Retention Periods: the systems in the United Kingdom before and after the Protection of Freedoms Act 2012.....	28

Chapter 1 – Introduction

Definitions

1. In this guidance the:
 - “**1984 Act**” or “**PACE**” means the Police and Criminal Evidence Act 1984;
 - “**1989 Order**” or “**PACE NI**” means the Police and Criminal Evidence (Northern Ireland) Order 1989
 - “**1989 Act**” means the Security Services Act 1989;
 - “**1995 Act**” means the Criminal Procedures (Scotland) Act 1995;
 - “**CJPOA**” means the Criminal Justice and Public Order Act 1994
 - “**1994 Act**” means the Intelligence Services Act 1994;
 - “**2000 Act**” or “**TA2000**” means the Terrorism Act 2000;
 - “**2001 Act**” or “**ICCA**” means the International Criminal Court Act 2001;
 - “**2008 Act**” or “**CTA**” means the Counter-Terrorism Act 2008;
 - “**2010 Act**” or “**CSA**” means the Crime and Security Act 2010;
 - “**2011 Act**” or “**TPIMA**” means the Terrorism Prevention and Investigation Measures Act 2011;
 - “**2012 Act**” or “**the Act**” means the Protection of Freedoms Act 2012;
 - “**2013 Act**” or “**CJ(NI)A**” means the Criminal Justice (Northern Ireland) Act 2013 (as will be).

Terms in *italics* are defined in the Glossary at the end of this code.

Statutory Guidance

The Guidance

2. This guidance is to provide direction to any *police force* or other *law enforcement authority* regarding the retention and use of *biometric material* for national security purposes through the making or renewing of a national *security determination* (“a NSD”).
3. This guidance is issued pursuant to section 22 of the 2012 Act, which places the *Secretary of State* under a duty to give guidance about making or renewing of a NSD under the provisions set out in section 20(2)(a) of the 2012 Act.
4. This guidance is publicly available and, in particular, should be readily accessible by members of any police force or law enforcement authority seeking to extend the permissible period of retention, for national security purposes, of DNA profiles or fingerprints which they have hitherto retained.

Law enforcement authorities

5. Only a law enforcement authority listed under section 18E(1) of the Counter-Terrorism Act 2008 or specified in any order made by the Secretary of State under that section may make or renew a NSD.

Effect of guidance

6. This guidance is admissible as evidence in criminal and civil proceedings. If any provision of this guidance appears relevant to any court or tribunal considering any such proceedings, or to the *Commissioner for the Retention and Use of Biometric Material* (“the Biometrics Commissioner”) overseeing the relevant Part of the 2012 Act, it can be taken into account.
7. A law enforcement authority may also be required to justify, with regard to this guidance, the retention, destruction or use of material held pursuant to a NSD, where appropriate.

Material to which this guidance applies

8. Part I, Chapter I of the 2012 Act provides for the making or renewal of NSDs for biometric material acquired under specific legislation. The retention periods and the relevant legislation are provided for by Part I, Chapter I of the 2012 Act and are set out at Chapter 2 of this guidance.

Extent

9. This guidance extends to the United Kingdom and applies to all relevant law enforcement authorities within it.

Purpose of guidance

10. The purpose of this guidance is to:
 - Set out the basic principles that underpin the powers of a *responsible Chief Officer or Chief Constable* authorised to make or renew a NSD extending the retention of biometric data.
 - To set out the threshold for making or renewing a NSD and the way in which those powers may be exercised.
 - To promote the fundamental principles to be observed by those authorised to make or renew a NSD under provisions mentioned in section 20(2)(a) of the 2012 Act and to ensure the effectiveness of the use of those powers to retain biometric data for national security purposes.
 - To ensure that any interference with the right to respect for private and family life (Article 8 of the European Convention on Human Rights (ECHR)) of persons to whom the data belongs is necessary, proportionate and in accordance with the law.
 - To confirm that a responsible Chief Officer or Chief Constable is required to justify the use of such powers, in relation both to the making or renewal of individual NSDs and the general pattern of their use, to the Biometrics Commissioner or in court. Any misuse of those powers is likely to be harmful to national security (particularly counter-terrorism) and to undermine public confidence in those law enforcement authorities permitted to exercise such powers. All Chief Officers or Chief Constables authorised to make or renew NSDs must be able to explain and justify their decisions to exercise those powers to the Biometrics Commissioner.

Basic application of this guidance

11. Powers to retain biometric data for national security purposes must be exercised fairly and responsibly.
12. Responsible Chief Officers or Chief Constables authorised to make or renew a NSD must have regard to this guidance when discharging the functions to which this guidance relates.
13. This guidance must be followed unless there are exceptional reasons not to do so, in which case the decision to depart from the procedures set out should be recorded in writing and the Biometrics Commissioner notified.

Basis for Lawful Retention of Biometric Material

14. The legislative background for the taking, retention and destruction of fingerprints, footwear impressions, DNA samples and DNA profiles is complex. The legal framework for retention of biometric data was required to be substantially amended or repealed following the decision of the European Court of Human Rights (“ECtHR”) in the case of *S and Marper v United Kingdom* [2008] ECHR 1581(2).

S and Marper v United Kingdom

15. In December 2008, in the case of *S and Marper v United Kingdom* [2008] ECHR 1581(2) the European Court of Human Rights (“ECtHR”) ruled that the provisions in PACE (and the equivalent legislation in Northern Ireland, the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE NI”)), permitting the ‘blanket and indiscriminate’ retention of DNA from non-convicted individuals violated Article 8 (right to privacy) of the European Convention on Human Rights (“ECHR”). In response to this judgment, provisions were brought forward in sections 14 to 23 of the Crime and Security Act 2010 (“the 2010 Act”) which, amongst other things, allowed for the retention for 6 years of fingerprints and DNA profiles of persons arrested for, but not convicted of, any recordable offence. Sections 14 to 18, 20 and 21 of the 2010 Act established a separate approach to the retention of DNA profiles and fingerprints by the police for national security purposes and made provision for the extended retention of DNA and fingerprints on national security grounds. The provisions of the 2010 Act have not been brought into force and Part 1 of Schedule 10 to the Protection of Freedoms Act 2012 repeals them.
16. The equivalent legislation in Scotland is contained in sections 18 to 20 of the Criminal Procedure (Scotland) Act 1995 (as amended).

The Protection of Freedoms Act 2012

17. On 20 May 2010, the Coalition Programme for Government¹ was published which stated that the Government “will adopt the protections of the Scottish model for the DNA database”. The 2012 Act implements that commitment for England and Wales. It does so by providing for a new framework to regulate the retention, destruction and use of biometric data obtained in accordance with definite statutory regimes by the police and other specified law enforcement authorities. The key characteristic of this new framework is that it does not permit the indefinite retention of biometric material unless the person from whom it was taken is, or has

¹ <http://webarchive.nationalarchives.gov.uk/20100526084809/http://programmeforgovernment.hmg.gov.uk>

been, convicted of an offence. Retained material will be required to be held for a specified period (in most cases 3 years) and then destroyed unless one of a small number of limited extension exemptions applies. In addition the new framework makes particular provision for material taken from juveniles (i.e. persons under the age of 18 years).

18. As part of these changes, the extended retention of biometric material on national security grounds through the making of national security determinations would be permitted (as it had under the 2010 Act) but with the additional safeguard of independent oversight in the form of the Biometrics Commissioner.

Chapter 2 – The making of National Security Determinations

Powers to make National Security Determinations (NSDs)

Scope

19. This code concerns the exercise of powers that permit the making or renewal of national security determinations by a responsible Chief Officer, Chief Constable or any other person so authorised contained in,
- a) section 63M of the **Police and Criminal Evidence Act 1984** (section 63D material retained for purposes of national security);
 - b) paragraph 20E of Schedule 8 to the **Terrorism Act 2000** (paragraph 20A material retained for purposes of national security);
 - c) section 18B of the **Counter-Terrorism Act 2008** (section 18 material retained for purposes of national security);
 - d) paragraph 11 of Schedule 6 to the **Terrorism Prevention and Investigation Measures Act 2011** (paragraph 6 material retained for purposes of national security);
 - e) section 18G of the **Criminal Procedure (Scotland) Act 1995** (certain material retained for purposes of national security); and
 - f) paragraph 7 of Schedule 1 to the **Protection of Freedoms Act 2012** (material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989 retained for purposes of national security) / [or the relevant section(s) of the Criminal Justice (Northern Ireland) Act 2013 (as will be),

and as brought into effect by the relevant commencement order.

20. These provisions are reproduced at Annexes **A** to **C**.

Retention Periods

21. The Protection of Freedoms Act 2012 prescribes the periods for which certain types of biometric material may be retained. The 2012 Act amends the system in England and Wales governing the retention of DNA and fingerprints taken from those persons who are arrested for, but not convicted of an offence. This is in order to ensure that DNA and fingerprint material is only retained indefinitely where a person has been convicted of crime, or for a specified period where a person has been arrested for, but not convicted of a serious offence.
22. This means that the police and other law enforcement authorities may:
- a) Retain indefinitely DNA and fingerprints taken from those persons who are convicted of a recordable offence (or an offence punishable by imprisonment in Scotland), but may not retain material indefinitely for those who have not been convicted of an offence;
 - b) Retain for a limited period (in most cases up to 3 years) DNA and fingerprints taken from those persons who are arrested but not convicted of a serious offence (i.e. a *qualifying offence*);

- c) Retain DNA and fingerprints taken from those persons arrested but not convicted of a minor offence (i.e. *non-qualifying offence*), for a reasonable period where this is for the sole purpose of conducting a speculative search against existing holdings of biometric material;
- d) Retain material taken from juveniles (persons under the age of 18 at the time of their arrest or detention) only in certain circumstances – taking account of the ages at which peak offending occurs, the findings of the European Court of Human Rights in *S & Marper v UK* which made special reference to children and the retention of the DNA of non-convicted children, and the provisions of the UN Convention on the Rights of the Child;
- e) Retain material given voluntarily but ensure it is destroyed as soon as it has fulfilled the purpose for which it was taken, unless the person to whom it belongs is previously or subsequently convicted of a recordable offence, in which case it can be retained indefinitely; and
- f) Retain material with the consent of the person to whom that material belongs as long as that person consents in writing to its retention (although a person may withdraw his or her consent at any time and if they do such material must be destroyed).

23. In addition, the police and other law enforcement authorities must:

- g) Destroy DNA a sample as soon as a profile has been derived from it or within 6 months of it being taken – whichever is sooner.

Extending Retention Periods

DNA Samples

24. There is one exemption to the otherwise absolute requirement to destroy DNA samples within 6 months.

Extended Retention by Application to a District Judge (Magistrates' Court)

25. The police or other law enforcement authorities may apply to a District Judge (Magistrates' Court) for an order extending the retention period for a DNA sample by an additional 12 months beginning on the date the material would otherwise have been required to be destroyed. Such an application can only be made in respect of DNA samples taken from a person in connection with a qualifying offence and where a responsible chief officer considers that a sample is likely to be needed in any proceedings for the offence for the purposes of disclosure to, or use by, the defendant, or in response to any challenge by the defendant in respect of the admissibility of material that is evidence the prosecution proposes to rely on.

DNA Profiles and Fingerprints

26. There are two ways in which the retention of DNA profiles and fingerprints can be retained for longer than the specified period – either with permission from a magistrate or on national security grounds.

Extended Retention by Application to a District Judge (Magistrates' Court)

27. The Protection of Freedoms Act 2012 permits the extension on a case by case basis of the standard retention period for material retained under PACE (whether following being charged with a qualifying offence, or arrested for such an offence and a successful application to the Commissioner) or section 41 of TA2000 with the approval of a District Judge (Magistrates' Courts). In any particular case, the police may apply during the last three months of the three-year period to a District Judge (Magistrates' Court) for an order extending the retention period by an additional two years. An extension if so granted cannot be further extended and retention cannot be extended beyond five years in total under this process. The police may appeal to the Crown Court against a refusal by a District Judge (Magistrates' Court) to grant such an order and the person from whom the material was taken may similarly appeal to the Crown Court against the making of such an order. This guidance does not provide direction on the making of such applications.
28. This guidance only provides direction for cases where the retention period is to be extended for national security purposes through the making or renewing of a NSD.

Extended retention for National Security Purposes

29. The 2012 Act amends various pieces of legislation dealing with the retention, destruction and use of biometric material and in doing so also allows for DNA profiles and fingerprints taken or obtained under relevant legislation, to be retained for an additional period of up to 2 years for national security purposes. This period of extension is renewable. Such extensions are overseen by the Biometrics Commissioner, who has the power to order destruction of retained material where they consider that the criteria for extended retention have not been met.
30. A summary of the retention periods for England, Wales and Northern Ireland and for the separate system in Scotland is set out at Annex D.

Effect

31. A NSD made under provisions set out in Chapter I of Part I of the 2012 Act provides lawful authority for the extended retention and use of DNA and fingerprint material by a law enforcement authority. Responsibility for making a NSD rests with the responsible Chief Officer or Chief Constable of the law enforcement authority.
32. Making a NSD will ensure that further retention and use of biometric material is in accordance with the law and subject to strict safeguards.

Chapter 3 – Requirements

National security – approach

33. The UK's approach to national security is based on the recognition that it is a necessarily flexible concept which must be capable of evolving over time to take account of the changing threats faced. Accordingly, it is not a term defined anywhere in legislation where it appears (although non-exhaustive indications in some pieces of legislation² give broad examples of what the term may 'in particular' include).
34. This guidance is not to be taken as affecting the legally understood meaning of national security in any way.
35. Information on the UK's approach to national security can be found on the relevant pages of the GOV.UK website at <https://www.gov.uk/government/topics/national-security>.

A national security determination (NSD)

36. The power to extend the period of retention of biometric data for the purposes of national security is contained in section 20(2)(a) of the 2012 Act.
37. This power is an exemption from the requirement to destroy the biometric material in accordance with the 2012 Act. It permits the extended retention of material only for as long as a relevant NSD has effect in relation to that material.

The test to apply

Necessity

38. In order to make a NSD under any of the statutory provisions listed in section 20(2)(a) of the 2012 Act the responsible Chief Officer or Chief Constable must believe and have reasonable grounds for believing that a NSD is **necessary** in the circumstances of the particular case for the purposes of national security.
39. A NSD should only be made where the responsible Chief Officer or Chief Constable has considered information from which he can reasonably form the belief that retention of the material is 'necessary' for the purposes of national security. This may involve an assessment of any or all of the following categories of information:
 - a) Police intelligence
 - b) Arrest history
 - c) Information provided by others concerned in the safeguarding of national security
 - d) International intelligence

² See the Security Service Act 1989 and Intelligence Services Act 1994.

- e) Any other information considered potentially relevant by the responsible Chief Officer or Chief Constable

Proportionality

- 40. A decision to make a national security determination must be **proportionate**. The responsible Chief Officer or Chief Constable must have regard to that individual's right to privacy, as provided for by Article 8 of the ECHR. If retention is considered necessary, the responsible Chief Officer or Chief Constable making the NSD must also believe that such retention is proportionate to the goal sought – i.e. for the purposes of national security. This will involve balancing any interference with an individual's ECHR Article 8 rights against the need to retain such material for national security purposes.

Making a national security determination

- 41. A NSD must be made in writing by the responsible chief officer or chief constable. The NSD has effect for a maximum of **2 years** beginning with the date on which it is made (by the responsible Chief Officer or Chief Constable). At the end of this period the NSD may be **renewed** subject to the necessity and proportionality tests described above continuing to be met. In Northern Ireland, a NSD has effect for a maximum of 2 years beginning with the date on which the material would, in the absence of a NSD, first become liable for destruction. At the end of this period the NSD may be renewed subject to the necessity and proportionality tests described above continuing to be met.
- 42. A NSD may only be made by a responsible Chief Officer or Chief Constable as defined by the 2012 Act and only where the test for extending retention has been met.

Preparing an application to a responsible Chief Officer or Chief Constable

- 43. Where an officer considers that it is necessary and proportionate to retain material for the purposes of national security, rather than destroy it in accordance with the relevant statutory retention period, they should prepare an application to make or renew a NSD and submit it for consideration to the responsible Chief Officers or Chief Constable as soon as reasonably practicable. They must set out all factors potentially relevant to the making or renewing of a NSD and their reasoned recommendation that the responsible Chief Officer or Chief Constable make or renew a NSD in any given case.
- 44. An officer should include their analysis of any and all categories of information as per paragraph 39 as above. The application should set out all relevant factors and considerations including those which may undermine the case for making or renewing a NSD.

Submission of an application to a Responsible Chief Officer or Chief Constable

- 45. An officer making an application for a NSD to the responsible Chief Officer or Chief Constable within a reasonable period of before the expiry of the applicable statutory retention period in order to allow the Chief Officer or Chief Constable sufficient time to give full consideration.

46. A responsible Chief Officer or Chief Constable must consider any application made to them and make a decision on whether to make or renew a NSD before the expiry of the applicable statutory retention period. This decision must be made in writing. The responsible Chief Officer or Chief Constable may before making their decision request such additional information or clarification as they consider appropriate.

Co-ordinator of National Functions Counter-Terrorism

47. Before taking their decision on whether to make or renew a NSD, a responsible Chief Officer or Chief Constable must consult the Co-ordinator of National Functions Counter-Terrorism in order to ensure that they have considered all relevant information.

Independent Oversight by the Biometrics Commissioner

The Biometrics Commissioner's responsibilities

48. The Biometrics Commissioner is appointed by the Secretary of State to provide independent oversight of the exercise of powers to make or renew NSDs and to review the uses to which biometric material, once subject to an NSD, is put. Specifically, under sections 20(2)(a) and 20(2)(b), the Biometrics Commissioner must keep under review,
- every NSD made or renewed; and
 - the uses to which material retained pursuant to a NSD is put.
49. Section 20(4) of the Protection of Freedoms Act 2012 provides that where the Biometrics Commissioner concludes that it is not necessary for material retained pursuant to a NSD to be so retained, they may order the destruction of the material at issue provided that it may not otherwise be lawfully retained.

Notifying the Biometrics Commissioner

50. A responsible Chief Officer or Chief Constable making or renewing a NSD must notify the Biometrics Commissioner of any NSD made or renewed within 28 calendar days of it being made.
51. A *notification* must include a copy of the written NSD and cite the reasons for making it. The notification must be in writing and must be appropriately protectively marked and transmitted in accordance with applicable security procedures to the Biometrics Commissioner.
52. When considering a NSD notification submitted by a responsible Chief Officer or Chief Constable, the Biometrics Commissioner may seek further information or clarification from the responsible Chief Officer or Chief Constable. A responsible Chief Officer or Chief Constable is under a duty to disclose or provide to the Biometrics Commissioner any documents or information which the Commissioner may require for the purpose of carrying out their function to review the making or renewing of a NSD. The responsible Chief Officer or Chief Constable must therefore provide the Commissioner with all documents and information that the Commissioner requires to carry out their oversight function. This is likely to include all documentation which was considered by the responsible Chief Officer or Chief Constable in making or renewing a NSD. In disclosing or providing documents or information to the Commissioner, the responsible Chief Officer or Chief Constable must ensure the request to do so and any response is centrally recorded (see paragraphs 67-74).

53. Where the Commissioner does not agree that retention of material covered by a NSD made (or renewed) by a responsible Chief Officer or Chief Constable is necessary and proportionate in all the circumstances, the responsible Chief Officer or Chief Constable will be informed.
54. Every person who makes or renews a NSD under provisions set out in section 20(2)(a) of the 2012 Act must comply with an order by the Biometrics Commissioner to destroy material retained pursuant to a NSD in accordance with instructions set out by the Biometrics Commissioner.
55. A responsible Chief Officer or Chief Constable must confirm in writing to the Biometrics Commissioner that destruction has occurred.

Cancelling a National Security Determination

56. It is the duty of a responsible Chief Officer or Chief Constable to keep under review the continued necessity of retaining biometric material pursuant to a NSD.
57. If during the period of a NSD being in effect, the responsible Chief Officer or Chief Constable comes to believe that it is no longer necessary to retain that material, the NSD should be cancelled, and the Biometrics Commissioner notified. The material hitherto retained must then be destroyed as soon as reasonably practicable, unless the material at issue is capable of being retained under other legislation.

Requirement to Consult

58. A responsible Chief Officer or Chief Constable must, before making a decision to cancel a NSD and destroy material retained pursuant to it, consult relevant law enforcement authorities. They must also consult the Co-ordinator of National Functions Counter-Terrorism.

Renewing a National Security Determination

59. A NSD may be renewed by a responsible Chief Officer or Chief Constable if they consider it **necessary** and proportionate to do so.

The test to apply

60. The test for renewing a NSD is the same as it is for making a NSD. The responsible Chief Officer or Chief Constable must determine that it is necessary for material to be retained for the purposes of national security.
61. A NSD may only be renewed where there is information or the existence of circumstances which lead the responsible Chief Officer or Chief Constable to believe that the exercise of those powers is 'necessary' for the purposes of national security. This may involve an assessment of any or all of the following categories of information set out in paragraph 39 above.
62. A renewed NSD may be based on the same or substantially the same intelligence used to make the original determination. The absence of new information at the time of renewal does not preclude renewal. The responsible Chief Officer or Chief Constable must also satisfy themselves that an assessment regarding the renewal of a NSD is up to date.

63. A renewed NSD has effect for a maximum of **2 years** beginning with the date on which it is made (by the responsible Chief Officer or Chief Constable).
64. Given the enduring nature of some national security threats, it may be necessary to renew a NSD on multiple occasions. There is no limit to the number of times that a national security determination may be renewed but each time it is renewed it must be necessary and proportionate to renew.
65. A responsible Chief Officer or Chief Constable must, before making a decision **not** to renew a NSD, consult any relevant law enforcement authorities. A responsible Chief Officer or Chief Constable must also consult the Co-ordinator of National Functions Counter-Terrorism.

Notification of Renewal to the Commissioner

66. The Biometrics Commissioner must be notified of the renewal by a Chief Officer or Chief Constable of a NSD within 28 calendar days of a NSD being renewed. This notification of renewal must be in writing, be appropriately protectively marked and transmitted in accordance with applicable security procedures to the Commissioner.

Chapter 4 – Keeping of records

Recording requirements

67. A centrally retrievable record of every NSD made or renewed (including a copy of the NSD notification submitted to the Commissioner). A progress log should also be established and maintained by each law enforcement authority and regularly updated whenever a NSD is made, renewed or cancelled.
68. The log should record:
- The date on which the responsible Chief Officer or Chief Constable made the NSD, his or her name, organisation and rank.
 - The date on which the Biometrics Commissioner was notified of the NSD by being sent the NSD notification.
 - The date on which confirmation of receipt of the NSD notification by the Biometrics Commissioner was received.
 - The outcome of the Biometrics Commissioner's consideration of the NSD (**'the decision'**).
 - The date on which destruction of material held occurred (and whether destruction was by order of the Biometrics Commissioner)
 - The date on which a NSD was cancelled by a responsible Chief Officer or Chief Constable (if applicable)
 - The same points for any subsequent renewals of a NSD.
69. A copy of the central record and progress log should be provided to the Senior National Counter-Terrorism Co-ordinator (or a nominated person designated for such purposes by the Senior National Counter-Terrorism Co-ordinator).

Reporting requirements

70. In order to contribute to the effective oversight of the operation of the powers for retention on national security grounds, each law enforcement authority with the power to make or renew a NSD must record and supply to the Home Office for every 12 month period from the date of commencement ("the reporting period") the following statistical information:
- Number of applications made to a Chief Officer or Chief Constable that were rejected during the reporting period
 - Number of NSDs made during the reporting period
 - Number of NSD renewed during the reporting period
 - Number of NDSs overturned by the Biometrics Commissioner during the reporting period
 - Number of orders for destruction received from the Biometrics Commissioner during the reporting period
 - Number of NSDs that have expired during the reporting period
 - Number of NSDs that have been cancelled before the end of the permitted retention period during the reporting period

71. Each law enforcement authority must ensure that this data is transmitted to the Home Office by a date to be designated by the Home Office.

Information management

72. Information processed by law enforcement authorities for the purposes of making or renewing a NSD must be done in accordance with the Data Protection Act 1984. Information that is stored and handled by the police must be done so in compliance with the relevant guidance on the Management of Police Information which is published online.

73. Any and all classified information must be managed in accordance with applicable security procedures. This means, in particular that it must be stored and transmitted securely. Authorisation for the use of any classified information owned or supplied by a third party or parties where it is intended to be used to support the making or renewing of a national security determination must be obtained from the originating third party or parties.

74. It is the duty of a responsible Chief Officer or Chief Constable to ensure that access by the Biometrics Commissioner is granted to the centrally retrievable record and progress log as and when requested.

Chapter 5 - Glossary

Police Force	<p>A police force - meaning,</p> <ul style="list-style-type: none"> • the metropolitan police force; • a police force maintained under section 2 of the Police Act 1996 (police forces in England and Wales outside London); • the City of London police force; • the Police Service of Scotland; • the Police Service of Northern Ireland; • the Police Service of Northern Ireland Reserve; • the Ministry of Defence Police; • the Royal Navy Police; • the Royal Military Police; • the Royal Air Force Police; • the British Transport Police.
Law enforcement authority	<p>A police force (as defined above) AND the Serious Organised Crime Agency, the Commissioners for Her Majesty's Revenue and Customs, a person formed or existing under the law of a country or territory outside the United Kingdom so far as exercising functions which correspond to those of a police force, or otherwise involve the investigation or prosecution of offences</p>
Biometric material	<p>DNA sample - any material that has come from a human body and consists of or includes human cells</p> <p>DNA profile - any information derived from a DNA sample.</p> <p>Fingerprints - a record (in any form and produced by any method) of the skin pattern and other physical characteristics or features of a person's fingers or either of a person's palms.</p>
National Security Determination (NSD)	<p>A determination made by a responsible chief officer or chief constable (of a law enforcement authority) to extend the retention of biometric material held on national security grounds</p>
Responsible Chief Officer or Chief Constable	<p>A person within a law enforcement authority who is entitled to authorize the retention of biometric material for national security purposes. They being:</p> <ul style="list-style-type: none"> • the chief officer of a police force in England and Wales; • the Chief Constable of the Police Service of Scotland; • the Chief Constable of the Police Service of Northern Ireland; • the Chief Constable of the Ministry of Defence Police; • the Provost Marshal for the Royal Military or Royal Air Force police force; • the Chief Constable of the British Transport Police; • the Director General of the Serious Organised Crime Agency; • the Commissioners for Her Majesty's Revenue and Customs.
Co-ordinator of National Functions Counter-Terrorism	<p>The senior Officer with oversight of the Police National CT Network and responsibility for leading the operational and professional development of that network.</p>
NSD submission	<p>A written submission to a responsible chief officer or chief constable requesting that they make or renew a national security determination.</p>

Notification - Notice of authorisation by responsible chief officer to the Biometrics Commissioner	A written NSD submission which has been approved by a responsible chief officer or chief constable and that is sent to the Biometrics Commissioner for review.
Secretary of State	Any Secretary of State (in practice this will generally be the Home Secretary)
Qualifying offence	Offences listed under Section 7 of the Crime and Security Act 2010.
Non-qualifying offence	A recordable offence (or in Scotland and offence punishable with imprisonment) not otherwise listed under section 7 of the Crime and Security Act 2010.

Annex A - Section 20(2)(a) to the Protection of Freedoms Act 2012

National security: appointment of Commissioner

- (2) It is the function of the Commissioner to keep under review—
- (a) every national security determination made or renewed under—
 - (i) section 63M of the Police and Criminal Evidence Act 1984 (section 63D material retained for purposes of national security),
 - (ii) paragraph 20E of Schedule 8 to the Terrorism Act 2000 (paragraph 20A material retained for purposes of national security),
 - (iii) section 18B of the Counter-Terrorism Act 2008 (section 18 material retained for purposes of national security),
 - (iv) paragraph 11 of schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011 (paragraph 6 material retained for purposes of national security),
 - (v) section 18G of the Criminal Procedure (Scotland) Act 1995 (certain material retained for purposes of national security), and
 - (vi) paragraph 8 of Schedule 1 to this Act (material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989 retained for purposes of national security),

Annex B - Section 63M of the Police and Criminal Evidence Act 1984

Material retained for purposes of national security

After section 63L of the Police and Criminal Evidence Act 1984 (for which see section 8) insert—

"63M Retention of section 63D material for purposes of national security

- (1) Section 63D material may be retained for as long as a national security determination made by the responsible chief officer of police has effect in relation to it.
- (2) A national security determination is made if the responsible chief officer of police determines that it is necessary for any section 63D material to be retained for the purposes of national security.
- (3) A national security determination—
 - (a) must be made in writing,
 - (b) has effect for a maximum of 2 years beginning with the date on which it is made, and
 - (c) may be renewed."

Annex C - Schedule 1 to the Protection of Freedoms Act 2012: Paragraph 20E of Schedule 8 to the Terrorism Act 2000

20E

- (1) Paragraph 20A material may be retained for as long as a national security determination made by the responsible chief officer of police has effect in relation to it.
- (2) A national security determination is made if the responsible chief officer of police determines that it is necessary for any paragraph 20A material to be retained for the purposes of national security.
- (3) A national security determination—
 - (a) must be in writing,
 - (b) has effect for a maximum of 2 years beginning with the date on which the determination is made, and
 - (c) may be renewed.

Annex C (a) - Schedule 1 to the Protection of Freedoms Act 2012: Section 18B of the Counter-Terrorism Act 2008

18B Retention for purposes of national security

- (1) Section 18 material which is not a DNA sample may be retained for as long as a national security determination made by the responsible officer has effect in relation to it.
- (2) A national security determination is made if the responsible officer determines that it is necessary for any such section 18 material to be retained for the purposes of national security.
- (3) A national security determination—
 - (a) must be in writing,
 - (b) has effect for a maximum of 2 years beginning with the date on which the determination is made, and
 - (c) may be renewed.

Annex C (b) - Schedule 1 to the Protection of Freedoms Act 2012: Paragraph 11 of Schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011

11

- (1) Paragraph 6 material may be retained for as long as a national security determination made by the responsible chief officer of police has effect in relation to it.
- (2) A national security determination is made if the responsible chief officer of police determines that it is necessary for any paragraph 6 material to be retained for the purposes of national security.
- (3) A national security determination—
 - (a) must be in writing,
 - (b) has effect for a maximum of 2 years beginning with the date on which the determination is made, and
 - (c) may be renewed.

Annex C (c) - Schedule 1 to the Protection of Freedoms Act 2012: Section 18G of the Criminal Procedure (Scotland) Act 1995

6

- (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) In section 18(3), for “18F” substitute “18G”.
- (3) After section 18F insert—

“18G Retention of samples etc: national security

- (1) This section applies to—
 - (a) relevant physical data taken from or provided by a person under section 18(2) (including any taken or provided by virtue of paragraph 20 of Schedule 8 to the Terrorism Act 2000),
 - (b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A) (including any taken by virtue of paragraph 20 of Schedule 8 to the Terrorism Act 2000),
 - (c) any relevant physical data, sample or information derived from a sample taken from, or provided by, a person under section 19AA(3),
 - (d) any relevant physical data, sample or information derived from a sample which is held by virtue of section 56 of the Criminal Justice (Scotland) Act 2003, and
 - (e) any relevant physical data, sample or information derived from a sample taken from a person—
 - (i) by virtue of any power of search,
 - (ii) by virtue of any power to take possession of evidence where there is immediate danger of its being lost or destroyed, or
 - (iii) under the authority of a warrant.
- (2) The relevant physical data, sample or information derived from a sample may be retained for so long as a national security determination made by the relevant chief constable has effect in relation to it.
- (3) A national security determination is made if the relevant chief constable determines that is necessary for the relevant physical data, sample or information derived from a sample to be retained for the purposes of national security.
- (4) A national security determination—
 - (a) must be in writing,
 - (b) has effect for a maximum of 2 years beginning with the date on which the determination is made, and
 - (c) may be renewed.

- (5) Any relevant physical data, sample or information derived from a sample which is retained in pursuance of a national security determination must be destroyed as soon as possible after the determination ceases to have effect (except where its retention is permitted by any other enactment).
- (6) In this section, “the relevant chief constable” means the chief constable of the police force of which the constable who took the relevant physical data, or to whom it was provided, or who took or directed the taking of the sample, was a member.”

Annex C (d) - Schedule 1 to the Protection of Freedoms Act 2012: Police and Criminal Evidence order (Northern Ireland) 1989

7

- (1) This paragraph applies to the following material—
 - (a) a DNA profile to which Article 64 of the 1989 Order (destruction of fingerprints and samples) applies, or
 - (b) fingerprints to which Article 64 of the 1989 Order applies, other than fingerprints taken under Article 61(6A) of that Order.
- (2) If the Chief Constable of the Police Service of Northern Ireland determines that it is necessary for any material to which this paragraph applies to be retained for the purposes of national security—
 - (a) the material is not required to be destroyed in accordance with Article 64 of the 1989 Order, and
 - (b) Article 64(3AB) of that Order does not apply to the material, for as long as the determination has effect.
- (3) 20A determination under sub-paragraph (2) (“a national security determination”)—
 - (a) must be made in writing,
 - (b) has effect for a maximum of 2 years beginning with the date on which the material would (but for this paragraph) first become liable for destruction under the 1989 Order, and
 - (c) may be renewed.
- (4) Material retained under this paragraph must not be used other than—
 - (a) in the interests of national security,
 - (b) for the purposes of a terrorist investigation,
 - (c) for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
 - (d) for purposes related to the identification of a deceased person or of the person to whom the material relates.
- (5) This paragraph has effect despite any provision to the contrary in the 1989 Order.
- (6) In this paragraph—
 - (a) the reference to using material includes a reference to allowing any check to be made against it and to disclosing it to any person,
 - (b) the reference to crime includes a reference to any conduct which—
 - (i) constitutes one or more criminal offences (whether under the law of Northern Ireland or of any country or territory outside Northern Ireland), or

- (ii) is, or corresponds to, any conduct which, if it all took place in Northern Ireland, would constitute one or more criminal offences, and
- (c) the references to an investigation and to a prosecution include references, respectively, to any investigation outside Northern Ireland of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside Northern Ireland.

(7) In this paragraph—

“the 1989 Order” means the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989/1341 (N.I. 12)S.I. 1989/1341 (N.I. 12));

“DNA profile” means any information derived from a DNA sample;

“DNA sample” means any material that has come from a human body and consists of or includes human cells;

“offence”, in relation to any country or territory outside Northern Ireland, includes an act punishable under the law of that country or territory, however it is described;

“terrorist investigation” has the meaning given by section 32 of the Terrorism Act 2000.

Annex D - DNA and Fingerprint Retention Periods: the systems in the United Kingdom before and after the Protection of Freedoms Act 2012

Occurrence	Prior to PoFA - System in England, Wales and Northern Ireland	Scottish System	Protection of Freedoms Act 2012
ADULT – Conviction – All Offences	Indefinite	Indefinite	Indefinite
ADULT – Arrested but no Conviction – Serious Offences	Indefinite*	3 Years + Poss. 2-Year Extension(s) by a Court	3 Years, plus a possible single 2-Year Extension by a Court
ADULT – Arrested but no Conviction – Minor Offences	Indefinite*	None	None (following conduct of a ‘speculative search’)
UNDER 18s – Conviction – Serious Offences	Indefinite	Indefinite	Indefinite
UNDER 18s – Conviction – Minor Offences	Indefinite	Indefinite	1st Conviction – 5 Years, plus length of any custodial sentence) 2nd Conviction – Indefinite
UNDER 18s – Arrested but No Conviction – Serious Offences	Indefinite*	3 Years + Poss. 2-Year Extension(s) by Court	3 Years + Poss. single 2-Year Extension by Court
UNDER 18s – Arrested but No Conviction – Minor Offences	Indefinite*	None	None (following ‘speculative search’)
National Security Grounds (including counter-terrorism)	Indefinite*	Not covered under Scottish legislation (i.e. a reserved matter)	
Indefinite under UK-wide legislation	3 Years plus, Renewable 2-year extension period(s) on National Security grounds		
Biological DNA Samples	Indefinite*	As per destruction of profiles	Destroy Within six months of sample being taken unless, Taken in connection with a serious offence AND likely to be needed in proceedings for purposes of disclosure or use by defendant or in response to a challenge to admissibility or prosecution evidence by the defendant

* Removal of DNA profiles, biological samples and fingerprints is allowed under ‘exceptional circumstances’. This requires an application to the Chief Constable of the relevant police force, removal from the database is then at his/her discretion.

